> Commission has the authority to issue rules of special concern to the CMRS providers.[39]

The appellate court accordingly refused to vacate the Commission's local competition rules, including Rule 51.703, as applied to LEC/CMRS interconnection.

LECs also argued on appeal that the Commission's rule "requiring mutual and reciprocal compensation of paging companies should be set aside":

> The FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network is also contrary to the plain language of the Act.[40]

The appellate court determined that this LEC argument was so baseless that it did not even specifically address this argument in its order, and it reaffirmed the validity of Rule 51.703(a) as applied to LEC/CMRS interconnection.

As noted, other LECs, but not the current petitioning LECs, asked the Commission to reconsider its *First Local Competition Order* as applied to LEC/paging interconnection. For example, Kalida Telephone Company asked the Commission to "reverse its decisions [1] to require 'mutual' or 'reciprocal' compensation to paging carriers and [2] that will require LECs to provide terminating facilities to paging providers at no charge."[41] Reconsideration of the first, reciprocal compensation issue would now appear to be foreclosed

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39 *Iowa Utilities Board*, 120 F.3d at 800 n.21.

40 Brief of the Mid-Sized Incumbent LECs filed in Case No. 96-3321 (8th Circuit) at 50-51.

41 Kalida Telephone Petition for Reconsideration and Clarification, Docket Nos. 96-98 and 95-185, at 1-2 (Sept. 30, 1996). *See also* Petition of the Local Exchange Carrier Coalition for Reconsideration and Clarification, Docket Nos. 96-98 and 95-185, at 17-18 (Sept. 30, 1996).

under the collateral estoppel doctrine. The Commission's reconsideration of the unlawfulness of LEC facilities charges remains pending.

G. *The SBC Clarification Letter and the Bureau's Ruling*. On April 25, 1997, over seven months after reconsideration petitions were due,[42] Southwestern Bell asked for "clarification" that the *First Local Competition Order* "prevents a LEC from recovering facilities charges" from paging carriers.[43] Southwestern's claim that the Commission's *Order* and rules were unclear was not credible. As noted above, in the *Order* the Commission ***expressly*** stated that an "interconnecting carrier should not be required to pay the providing carrier for one-way facilities . . . which the providing carrier owns and uses to send its own traffic."[44] In addition, other LECs such as Bell Atlantic and Sprint had no difficulty interpreting Commission orders and rules because they stopped charging Arch and AirTouch for facilities.[45]

Moreover, Kalida Telephone's reconsideration petition *expressly* asked the Commission "to reverse its decisions . . . that will require LECs to provide terminating facilities to

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42 *See* 47 U.S.C. § 405(a)("A petition for reconsideration *must be filed* within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.")(emphasis added).

43 SBC Application for Review at 2 (Jan. 29, 1998).

44 *First Local Competition Order*, 11 FCC Rcd. at 16028 ¶ 1062.

45 *See* Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Keith David, *et al.*, DA 97-2726, at n.3 (Dec. 30, 1997)("Bureau LEC Facilities Charges Letter").

paging providers at no charge."[46] Indeed, there is evidence that Southwestern's parent, *SBC, actually prepared the Kalida petition.*[47]

The Common Carrier Bureau, after seeking additional public comment, on December 30, 1997 confirmed that the *First Local Competition Order* and the Commission's implementing rules, including Rule 51.703(b) in particular, prohibit the type of facilities charges which Southwestern and other LECs had continued to impose. Specifically, the Bureau found "no basis" for the argument of some LECs that "LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers."[48]

The three petitioning LECs — Ameritech, SBC, and US WEST — now challenge the Bureau's confirmation of the Commission's rules. [49] These challenges are grossly untimely and should be dismissed without reaching the merits. The challenges also must fail on the merits because the Bureau's interpretation is consistent with the Communications Act of 1934, as amended, and the Commission's rules and policies. Therefore, the challenges must be denied. Arch and AirTouch's positions are set forth in the Opposition to Applications for Review to which this document is appended.

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46 Kalida Telephone Petition for Reconsideration, CC Docket No. 96-98, at 1-2 (Sept. 30, 1996).

47 Opposition of AirTouch Communications, AirTouch Paging, and Arch Communications to Petition for Stay Pending Commission Review, CCB/CPD No. 97-24, at n.7 (Feb. 19, 1997).

48 Bureau LEC Facilities Charges Letter at 2.

49 SBC Application at 1 and 4.

PCIA Personal Communications Industry Association

March 17, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Clarification of the Commission's Rules on Interconnection Between LECs and Paging Carriers*, CCB/CPD 97-24

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; First Report and Order, CC Docket Nos. 96-98, 95-185

Formal Complaints of AirTouch Paging against GTE, File Nos. E-98-08, E-98-10

Formal Complaints of Metrocall against Various LECs, File Nos. E-98-14-18

Dear Ms. Salas:

This letter is a follow up to recent meetings between representatives of the Personal Communications Industry Association ("PCIA") and certain FCC staff members in which we discussed the fact that the entitlement of one-way messaging carriers to terminating compensation was specifically addressed in the appeal to the Eighth Circuit of the Local Competition First Report and was resolved in favor of the paging companies.[1/]

As requested by some of the meeting participants, PCIA is providing excerpts from the "Brief of the Mid-Sized Incumbent Local Exchange Carriers" filed November 18, 1996 in Case No. 96-3321 (and the related cases that were consolidated in the 8th Circuit). These portions of the brief contain the petitioners' argument that "the FCC's rules requiring mutual and reciprocal compensation of paging companies should be set aside" because " the origination and termination of traffic between a LEC's network and that of a paging company is not 'mutual and reciprocal' since the paging company's customers do not originate calls." MILEC Brief, p. 51.

This issue was joined in the Court by the responsive brief filed jointly on behalf of the Commercial Mobile Radio Service ("CMRS") intervenors, to which PCIA was a party. Excerpts from the "Brief for CMRS Providers in Support of Respondents" filed December 23, 1996 also are attached. An entire section of this brief was devoted to the argument that the FCC properly found paging companies to be entitled to terminating compensation. The brief demonstrates that the statute

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1/ 11 FCC Rcd. 15499 (1996)

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does not require traffic to be reciprocal, or payments to be reciprocal, but rather requires that the obligation to compensate another carrier "for costs incurred" in terminating traffic be reciprocal. Since paging carriers originate no traffic, the LECs perform no termination functions and incur no costs. In this one-way context, the "reciprocal" recovery of costs properly results in payments flowing in one direction only.

Ultimately, the Court specifically upheld the Commission's LEC/CMRS interconnection rules **without denying paging carriers the benefits accorded other CMRS carriers.** Iowa Pub. Utils. Bd v. FCC, 120 F.3d 753, n. 21 (8th Cir. 1997). No party has challenged this ruling in the Supreme Court.

This analysis makes clear that the entitlement of paging companies to reciprocal compensation has been ruled upon by the Commission, upheld by the 8th Circuit on appeal and is now final. The Commission risks "snatching defeat from the jaws of victory" by revisiting this ruling now.

Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this letter are being filed with the Secretary's office. In addition, copies of this filing are being delivered to the individuals listed below.

Kindly refer questions in connection with this matter to the undersigned.

Respectfully submitted,

Angela E. Giancarlo

Angela E. Giancarlo, Esquire
Government Relations Manager

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EXCERPTS FROM

BRIEF OF THE MID-SIZED INCUMBENT LOCAL EXCHANGE CARRIERS

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Docket No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

ON PETITIONS FOR REVIEW OF THE FIRST REPORT AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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telecommunications carriers." In turn, the Act requires state commissions to determine wholesale rates "on the basis of retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other **costs that will be avoided** by the local exchange carrier." § 252(d)(3) (emphasis added). Section 251(c)(4) thus requires wholesale rates to be based on costs **actually** avoided, not costs that a LEC might, could, or should avoid. Once again, however, the FCC has put a spin on the Act that is at odds with the ordinary meaning of its words. It has defined avoided retail costs as "those costs that **reasonably can be avoided** when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." (Rule § 51.609(b))(emphasis added).

The FCC rests its interpretation, once again, not on the text of the Act but upon its unsupported understanding of the intent of the provision: "We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable." (Report ¶ 911). However, the FCC offers not a single citation to anything in the legislative history of the Act that supports its "beliefs" regarding Congress's intent. In any event, the best evidence of legislative intent is the language that Congress chose. Jones, 811 F.2d at 447. And § 252(d)(3) could not be clearer: wholesale rates are to be determined by reference to actual "avoided" costs, not hypothetically "avoidable" costs.

4. The FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network is also contrary to the plain language of the Act. Section 251(b)(5) imposes upon incumbent LECs the duty to "establish reciprocal compensation arrangement for the transport and termination of telecommunications." Section 252(d)(2)(A) provides that, for the purposes of § 251(b)(5), the terms of a reciprocal

compensation arrangement must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Read together, as they must be, these provisions of the Act make clear that a LEC must provide compensation to a fellow LEC for terminating a call that originated on the LEC's network only if the origination and termination of traffic by customers of the two carriers is "mutual and reciprocal."

Inexplicably, the FCC's rules require reciprocal compensation to be provided to paging providers for terminating traffic that originates with LECs. (Rule §§ 51.701 - 51.717; Report ¶ 1008). But paging customers cannot originate a "telephone call," or any other kind of telecommunication's traffic, on the paging company's network for termination on the LEC's network. That is, traffic runs in one direction -- from the LEC's customers, to the paging company, and thence to the paging company's customer. As such, the origination and termination of traffic between a LEC's network and that of a paging company is not "mutual and reciprocal" since the paging company's customers do not originate calls. Under such circumstances, a requirement that LECs compensate paging companies for calls originating on the LECs' networks means that the LECs are effectively subsidizing the paging company. Nothing in §§ 251(b)(5) or (d)(2)(A) warrants so anomalous a result. Accordingly, the FCC's rule requiring mutual and reciprocal compensation of paging companies should be set aside.

* * * *

The net result of the FCC's rules on pricing, promotions, interconnection and unbundling described above is to disable incumbent LECs, particularly mid-sized and small

EXCERPTS FROM

BRIEF FOR INTERVENORS CMRS PROVIDERS IN SUPPORT OF RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

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Rule is so bound up with the technical, and exclusively federal, judgments involved in radio licensing that this Court should defer to the FCC's judgment on the issue.

C. The FCC Properly Applied § 251(b)(5)'s Reciprocity Requirement To Paging Companies.

The only specific reference to CMRS in petitioners' briefs is the assertion by the Mid-Size LECs ("MILECS") that "[t]he FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network [are] . . . contrary to the plain language of the Act." MILEC Br. at 50. The MILECs argue that the one-way nature of paging traffic prevents a compensation arrangement between a LEC and a paging company from being "mutual and reciprocal." If this argument prevails, the LECs will actually charge the paging company for originating calls from the LECs own subscribers to paging units, rather than paying the paging company for termination services.

This argument makes no sense. Section 252(d)(2) specifically envisions the "recovery . . . of costs" incurred.[22] The undisputed evidence is that paging companies incur substantial costs for terminating LEC-originated calls.[23] Payment for call termination therefore involves no "subsidy" to paging carriers; indeed, the only subsidy occurs when LECs -- without any statutory support whatsoever -- charge for originating calls, even though origination costs are fully borne by the LECs' subscribers.[24]

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[22] If there is no traffic, there are no costs; thus, the absence of compensation in the absence of any traffic is entirely consistent with § 252.

[23] See Comments of Paging Network, Inc., CC Docket No. 96-98, filed May 16, 1996, at 11 (App. at 32).

[24] LECs benefit from paging interconnection because the ability to complete calls to pagers enhances the value of the LEC's network to its subscribers, which further undermines the subsidy argument.

The MILECS confuse "mutuality" of traffic flows with "mutuality" of obligation to compensate the other carrier for costs incurred. The FCC concluded that an obligation is "reciprocal" under § 251(b)(5) if each carrier is required to compensate the other for costs incurred in terminating the other carrier's calls, whether those costs are large, small, or nonexistent. That interpretation of the statute is reasonable and entitled to deference. Indeed, it is hard to see how the MILECs' definition of mutuality would not bar compensation whenever traffic flows were unequal, which they concede is often the case.[25]

Requiring paging companies to be compensated for terminating traffic also is necessary to avoid discrimination. Many telecommunications carriers offer paging along with other services, and will be paid for terminating pages as well as for terminating other communications over their facilities.[26] It would be unreasonable for a paging-only carrier not to be compensated for terminating a functionally equivalent one-way communication. Accordingly, the agency's interpretation of § 251(b)(5) as applied to paging companies must be upheld.

IV. The CMRS Provisions Are Severable From The Provisions Challenged By Petitioners.

Although petitioners attack only selected provisions of the FCC's 700-page Order, they have asked this Court to vacate the entire Order, including the many provisions which the LECs have not directly challenged or even mentioned. This "guilt by association" strategy cannot succeed absent an argument that the challenged and unchallenged provisions are so

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[25] LECs argued to the FCC that the imbalance in two-way mobile traffic flow entitled them to greater compensation than they would receive under a "bill and keep" arrangement. See Order ¶ 1109, at 537-38.

[26] LEC network architecture does not distinguish between calls that terminate as two-way voice communications and calls that terminate as pages.